To be argued by
W. LLOYD KITCHEL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of GREEN BAY AND WESTERN RAILROAD COMPANY,

Petitioners,

against

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ANSWERING BRIEF FOR RESPONDENT.

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The Opinions Below.

The Opinions of the United States Circuit Court of Appeals for the Second Circuit (R. 45-55) are reported in 147 Fed. (2nd) 777 (C. C. A. 2nd, 1945). The Opinion of the District Court (R. 37-40) is reported in 59 Fed. Supp. 98 (S. D. N. Y. 1944).

Grounds of Jurisdiction.

The case comes to this Court on a writ of certiorari granted October 8, 1945 to the Circuit Court of Appeals for the Second Circuit which affirmed the District Court for the

Southern District of New York in granting a motion to dismiss the complaint on the ground that the complaint involved the internal affairs of a foreign corporation and should be tried at the domicile of the corporation, Wisconsin.

Statement of the Case.

Respondent is a railroad corporation incorporated under the laws of Wisconsin and operating its railroad lines solely within that State, and within that State maintaining its main business offices and keeping its chief records. (R. 12).

It has been sued in the District Court below, in a representative action, by Petitioners, who hold some of its Class B Debentures. Petitioners in their brief, page 5, state their position in the litigation to be as follows:

> "Petitioners' position is that the language used in respondent's articles of incorporation (R. 3) and in the debentures (R. 6) grants to the Class B debentureholders an absolute and unqualified contractual right 'to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock' (R. 3-4)."

After the complaint had been filed in the District Court, Respondent made a motion to dismiss on the ground that the construction of the Class B Debentures, relating as it did, to the matter of distribution of surplus earnings, analogous to dividends, upon or after action taken by the Board of Directors, involved the internal affairs of a foreign corporation and properly should be tried in Wisconsin (R. 19).

Respondent also contended in the Courts below, as a railroad corporation and a common carrier operating in Wisconsin, subject to the duties of common carriers, that the construction of the Class B Debentures claimed by Petitioners which would force distribution by Respondent of all its net earnings to security holders, would limit or destroy the ability of Respondent to fulfill its duties as such a public carrier; that thereby necessarily the interests of the public, principally in Wisconsin, are affected and the Courts of that State are the proper Courts to determine the construction of the contract.

The capitalization of Respondent consists of $600,000 face amount of Class A Income Debentures, $2,500,000 par amount of Common Stock and $7,000,000 face amount of Class B Debentures (R. 15); the Class B Debentures being the debentures sued upon by Petitioners in the District Court below. All of these securities, including the Class B Debentures, were originally issued in 1896 pursuant to a plan of reorganization of the Respondent Railroad (R. 15). This reorganization resulted in connection with foreclosure action instituted in the Circuit Court of the United States for the Eastern District of Wisconsin in 1896.

The Class A Debentures and the Common Stock are securities senior to the Class B Debentures and are entitled to receive maximum income distributions of 5% of their face or par amount in any year before Class B Debentures receive any payment. The Class B Income Debentures are, therefore, junior equity securities (R. 15).

The Class B Debentures have no maturity date, are payable as to principal only in the event of a sale or reorganization of the railroad and property of the Respondent; in

the event of any such sale or reorganization, the net proceeds after payment of all liens and charges thereon are to be distributed, first, among the holders of Class A Debentures and the Capital Stock, and after such payments have been made, any surplus remaining is to be paid to the holders of Class B Debentures (R. 6-8).

The pertinent provisions of the Class B Debentures relating to distribution of income are as follows:

> "So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz: * * * (the deleted matter refers to payments to senior security holders limited to 5% of principal amount) * * *, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of Debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid * * *" (R. 7-8).

Judge Caffey in the District Court found that the action hinged around the internal affairs of the Respondent and was litigation "which inevitably and necessarily involves the internal affairs of the defendant" (R. 39).

The Circuit Court of Appeals for the Second Circuit affirmed (R. 56), one Judge dissenting (R. 49). Petition for rehearing was denied (R. 55).

The Issues Involved.

The comprehensive issue involved before this Court relates solely to jurisdiction, i.e. whether or not the District Court abused its discretion in refusing to entertain jurisdiction on the ground of *"forum non conveniens"*.

The merits of the suit below should not be decided in the instant proceeding before this Court. In the trial of the issues of such suit, whether resumed in the District Court or in a suit under jurisdiction of the Courts of Wisconsin, the Respondent's contention will be that there is language in the Class B Debentures which indicates that the directors have discretion in fixing and declaring distributions on the Class B Debentures to pay out only such amounts as they deem advisable and prudent under all the circumstances. Also, in connection with such contention for construction, the Respondent will claim that not only will the direct language of the provisions of the Class B Debentures be involved but also the surrounding circumstances of issuance and other pertinent factors (including possibly parol evidence by reason of ambiguity) which may be presented to a court for the purpose of determining the construction of a contract. There is nothing in the nature of a demurrer or its equivalent in this case which would warrant a final determination of the merits.

POINT I.

This suit involves questions relating to the internal affairs of the Respondent, a foreign corporation, within the doctrine of *forum non conveniens*.

Judge Frank was in error in stating in his dissenting opinion in the Circuit Court of Appeals that the only ground for sending the case to trial in Wisconsin was the alleged need for examination of Wisconsin Law. Neither the District Court nor the majority in the Circuit Court so held. The District Judge wrote:

> "If I be right as to internal affairs of the defendant being involved in the present suit, then it is within the discretion of this Court to dismiss it." (R. 40)

The order and judgment of the District Court were to the same effect (R. 41). The Circuit Court, in its majority opinion, affirmed upon that same ground (R. 47). The Petitioners at pages 3 and 7 (first paragraph) of their brief concede that both of the said courts so ruled. Strangely, however, the second and third paragraphs on page 7 directly contradict that concession. The Petitioners, by quoting only part of a sentence of the District Judge's opinion in the said paragraphs, imply that the District Judge not only failed to construe the Debenture but that his decision was based upon the mere fact that Wisconsin Law was involved. A comparison of the part of the sentence so quoted with the complete text and the record itself destroys those conclusions.

The portion of the said opinion, as quoted by the Petitioners on page 7 of their brief and their comment is as follows:

"The District Court apparently concluded that 'internal affairs' were involved because, as it said, 'the plaintiffs seek an interpretation of Wisconsin Law, of the articles of incorporation and of the B Debentures' (R. 39). It did not stop to construe the contract sued upon".

What the District Judge really said was as follows:

"In other words, among other things, the plaintiffs seek an interpretation of Wisconsin Law, of the articles of incorporation and of the B debentures which, without permitting discretion to be exercised by the directors, would force the defendant (Respondent) to pay to the B holders all surplus earnings for each year since 1924 after annually paying the holders of the common stock and of the A debentures 5% of the face thereof.

"It seems to be manifest that the lawsuit is a litigation which inevitably involves the internal affairs of the defendant (Respondent)" (R. 39).

It is apparent that the District Judge decided that the action involved the internal affairs of the Respondent because it sought a distribution of the earnings without permitting the directors to exercise their discretion, and that the court construed the Debentures as vesting the Directors with such discretion.

The Petitioners' position as set forth on page 5 of their brief is that the language used in the Articles of Incorporation (R. 3) and in the Debentures (R. 6) grants to the Class B Debentureholders an absolute and unqualified contractual right to receive any net earnings of the Railroad and property in each year remaining after payment of limited amounts to holders of senior securities.

The pertinent part of the said Debentures, providing for the payment of principal, is as follows:

> "* * * (the) sum of One Thousand Dollars will be payable to the bearer hereof * * * only in the event of a sale or reorganization of the railroad and property of said Company, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens or charges upon such railroad or property, and after payment of Six Hundred Thousand Dollars of a series of debentures known as Class A, issued to or to be issued by said Company, and the sum of Two Million, Five Hundred Thousand Dollars to and among the stockholders of said Company. Any such net proceeds remaining after such payments shall be distributed pro rata to and among the holders of this series of Class B Debentures." (R. 6, 7)

The said Debentures provide for payment of income, as follows:

> "* * * the holders * * * shall in lieu of interest thereon participate in the distribution of annual net income to the following extent only, viz:—So much of the annual net earnings in any year as would be applicable to the payment of dividends on stock shall be applied as follows (five percent upon the face value of the Class Debentures and on the par value of the common stock) *and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata.* None of such payments shall be cumulative. The amounts, if any, payable on this series of Debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February,

> in the following year, and when so declared, any amount payable hereon will be paid * * *." (R. 7, 8) (italics supplied)

The Petitioners in their brief and Judge Frank in his dissenting opinion in the Court below quote and emphasize the language we have above italicized. The Petitioners omit all reference to the language of the Debenture following the part so italicized, which refers to the discretion of the Board of Directors. Judge Frank quotes part of it, to-wit:

> "* * * the amount payable will be fixed and declared by the Board of Directors." (R. 51)

The complete sentence, which we emphasize, is as follows:

> "The amounts, if any, payable on this series of Debentures of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid * * *." (R. 7, 8)

Neither the Petitioners nor Judge Frank have mentioned or referred to the words "if any", contained in the first part of the complete sentence above quoted. The gist of the sentence is that it is for the Board to determine what part, if any, of the net earnings shall be paid to the holders of the Debentures. That the question of distribution of net earnings is vested in the Board of Directors and is a matter for their discretion is clearly established by the phrase, not mentioned by the Petitioners or Judge Frank, to-wit:

> "* * * when so declared, any amount payable hereon will be paid. * * *"

In other words, if the Board deems it inadvisable to declare a distribution, nothing shall be paid.

Also as demonstrating that the question of distribution of net earnings is vested in the Board of Directors, reference is made to the provision of the Debentures defining the participation of the debenture holders in the annual net income and stating that "So much of the annual net earnings in any year as would be applicable to the payment of dividends on stock shall be applied as follows:". The payment of dividends on stock is always subject to the discretion of the Board of Directors.

The Petitioners on page 8 of their brief refer to the provisions in the Articles of Incorporation stating that the holders of B Debentures are "to be entitled to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock". They fail to call attention to the further provision of the Articles of Incorporation reading as follows:

> "the said debentures to contain such further provisions as may be agreed upon between the Company and the said purchasers."

Pursuant to the clause last above quoted the Class B Debentures when issued did contain a further provision to the effect that the amounts payable upon the Class B Debentures "will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared any amount payable thereon

will be paid * * *". By the acceptance of the Debentures with this provision contained therein the holders thereof became bound thereby.

Cases in which, after trial or other proceedings upon the merits, discretion in the Board of Directors has been found in connection with distributions or interest on bonds or debentures of corporations, are the following:

Green Bay and Western Railroad Company, et al. v. *Commissioner of Internal Revenue*, 147 Fed. (2d) 585;

Day v. *Ogdensburgh & Lake Champlain Railroad Co.*, 107 N. Y. 129;

New York, Lake Erie & Western Railroad v. *Nickals*, 119 U. S. 296.

The Circuit Court of Appeals for the Second Circuit in the majority opinion in the instant case and the Circuit Court of Appeals for the Seventh Circuit have held that the distribution of the net earnings was discretionary with the Respondent's Board of Directors.

The Circuit Court of Appeals for the Second Circuit in the instant case said (p. 779):

> "If we could agree with appellants' assumption that the suit involved nothing except a claim upon a liquidated demand, that in short the contract of the Class B Debentures operated of itself to set apart and appropriate each year to those debentures the specific sums plaintiffs sue for, and that the fixing and declaration of the amounts by the directors was a mere formality, we should agree that jurisdiction ought not to have been declined. But we think it clear that this is an over-simplified view of what the

debentures intended to, and did, provide. The provision for declaration and payment of sums due annually under the debentures, as well as the long continued practice under it for the many years in question, leave in no doubt, we think, that before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them. Instead of carrying a fixed rate of interest, the debentures promised, in lieu thereof, a contingent portion of the annual net earnings, this interest to be ascertained, fixed and declared in each year by the directors. According to the claim, the directors in each of the years but three fixed and declared, and the appellee paid the amounts determined to be due. If, therefore, support were needed for the view that the provisions in the debentures, that the sums, if any, due were to be fixed and declared by the directors, mean just that, the long practice in accordance therewith and the long acquiescence of the debenture holders in that practice would provide it. * * *" (R. 45).

In *Green Bay and Western Railroad Company, et al.* v. *Commissioner of Internal Revenue*, 147 Fed. (2d) 585, (1945), the Circuit Court of Appeals for the Seventh Circuit, deciding that distributions on the Class B Debentures could not be deducted for the purpose of income tax, had occasion to pass on the nature of the Class B Debentures and found that there was discretion in the Board of Directors in the payment of distributions. The Court, referring to the Class B Debentures of the Respondent, said (p. 586):

"The debentures on their face disclose that they had no fixed maturity; that the dividends were not cumulative and were payable within the discretion of the board of directors; that there was no pro-

vision for interest on unpaid dividends: that the debenture holders had no right to maintain an action in case of default as to the payment of dividends inasmuch as such payment was in the discretion of the board of directors; that the status of the debenture holders of class A was on a par with that of stockholders; and that rights of the debenture holders, both class A and class B, were inferior to those of creditors. Moreover, the investments in the debentures represent value paid in at the time of petitioner's incorporation and constitute a large part of its operating capital. Furthermore, the investments can be withdrawn only at the dissolution of the corporation. They are subject to the hazards of the business and in our opinion may properly be be designated as a part of the capital structure."

The case of *Day v. Ogdensburgh and Lake Champlain Railroad Company*, 107 N. Y. 129 (1887) involved a representative action brought by plaintiffs as owners of certain income mortgage bonds issued by the defendant railroad company, on their own behalf, and that of owners of other bonds, to restrain the railroad company from using its net earnings for the purpose of carrying out the terms of a lease executed to it by another railroad company and for an accounting. The court, at pages 145, 146, held that the net earnings of the defendant were payable subject to the discretion of the directors and that, at most, the promise was to pay "dividends", if declared. The clause in the bonds, which the court construed as the grant of discretion to the directors, was as follows, viz.:

"* * * that the board of directors of said company shall determine the amount of such net earnings. * * *"

The clause in the debentures involved in the case at bar is much stronger, to wit:

> "The amounts, if any, payable * * * out of the net earnings * * * will be fixed and declared by the Board of Directors * * * and when so declared, any amount payable hereon will be paid * * *."

In *New York, etc. R. R. Co.* v. *Nickals*, 119 U. S. 296, the clause in the certificate of incorporation which was construed by this Court to give discretion to the directors as to payment of dividends on preferred stock, was as follows:

> "* * * non-cumulative dividends, at the rate of six per cent. per annum * * * dependent on the profits of each particular year, as declared by the board of directors."

This Court held that no dividends were payable until declared by the Board of Directors.

It will be recalled that the similar clause in the Class B Debentures of the Respondent provides:

> "None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors * * *, and when so declared * * * will be paid * * *." (R. 7, 8).

In the opinion of the Court in the above-mentioned case of *New York, etc. R. R. Co.* v. *Nickals*, at page 302, it is stated that the corporation reported a net profit from operations, after deducting operating expenses, interest, rentals of leased lines and other charges. The plaintiff claimed that the use of the fund for any other purpose other than for dividends was a breach of trust on the part of the Company. It was further set forth that the Company did not

deem it wise or expedient to declare a dividend upon its preferred stock and (at page 303) that the earnings were in good faith used for improving the Company's road and other property and further (at page 304), that there is nothing in the language of the preferred stock depriving the directors of their discretion.

The Petitioners on page 15 of their brief assert, in commenting upon the *Nickals* case, as follows:

> "Petitioners do not seek to avoid any expenditures or provisions made by the Company for additions or improvements to the road. On the contrary, the right of the directors to exercise discretion in that respect and to charge expenditures of this character against annual earnings is expressly recognized in Exhibit "B" attached to the complaint, for Petitioners claim only such residual earnings as remain 'after deducting reserves for additions, general improvements and depreciation' (R. 4, 8)."

The provisions of the Class B Debentures either provide for full discretion to the Board of Directors in connection with the payment of distributions or dividends or provide no discretion. The Petitioners by framing their complaint to exclude such amounts cannot thereby affect the terms of the contract. As a matter of fact, their position is inconsistent within their own brief for, on page 4, they assert the right of the directors to use discretion in setting up reserves but on page 5 assert categorically that the holders of Class B Debentures have an absolute and unqualified contractual right to receive any net earnings remaining after payment of the prescribed limited amounts to holders of senior securities.

The Petitioners are in a real dilemma. They do not wish to concede that the directors have full discretion and

yet they have great reluctance in accepting a construction which would deprive the directors of the right to use their judgment in running the Railroad and making necessary appropriations to surplus for provident purposes. They apparently have a natural feeling that any railroad which is required by contract to pay out all of its net earnings to security holders cannot long continue to operate.

The Class B Debentures are a very unusual type of security. Although called "debentures" they are the junior equity security of the Respondent, a position normally occupied by Common Stock. As heretofore stated they are junior not only to the Class A Debentures but also to the so-called Common Stock. In the event of reorganization or sale which is the only maturity date of the Debentures, the holders are entitled to everything remaining after payment of the face amount of the Class A Debentures ($600,000) and the Common Stock ($2,500,000) (R. 7). Therefore, all restrictions on distribution of annual earnings deemed necessary for the best interests of the Railroad operate to the ultimate benefit of the Class B Debentures. The Debentures were originally issued in the year 1896 pursuant to a plan of reorganization of predecessor companies resulting in a foreclosure action (R. 15) in the Federal District Court in Wisconsin. The Class A Debentures are analogous to First Preferred Stock, the Common Stock resembles voting second preferred stock and the Class B Debentures are analogous to non-voting common stock.

The comments of this Court in the *Nickals* case above-mentioned are so apt as to justify rather a lengthy quotation. At page 304, this Court said:

> "There is nothing in the language of either necessarily depriving the directors of the discretion with which managing agents of corporations are usually

invested, when distributing the earnings of property committed to their hands. As was said by the court, in *Clearwater* v. *Meredith*, 1 Wall. 25, 40, 'when any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized.' The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith upon the part of the directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when, in good faith, believed to be necessary, for the preservation or improvement of the property intrusted to its control. * * *

"* * * but it was not intended to confer upon the former (the preferred stockholders) an absolute right to a dividend in any particular year, dependent alone on the fact, or the official ascertainment of the fact, that there were profits in that year, after paying operating expenses and fixed charges. * * *"

The Petitioners and Judge Frank in his opinion cite the following cases in support of the contention that the directors have no discretion, to wit:

Crocker v. *Waltham Watch Co.*, 315 Mass. 397, 53 N. E. (2d) 230;
Burk v. *Ottawa Gas & Electric Co.*, 87 Kans. 6;
Wood v. *Lary*, 47 Hun 550.

Crocker v. *Waltham Watch Co.* is distinguishable. In that case the court found the language of the Agreement of Association to evidence immediate necessity and to be mandatory not only from the words employed, i. e., "shall forthwith declare and pay to the holders of the common stock, Class A, a dividend * * * provided the Company's capital will not be impaired by such payment." but also in the light of surrounding circumstances of the issuance of the shares to the public for cash. Neither language nor circumstances surrounding the issuance are similar in the case at bar.

The Massachusetts Court seemed to be strongly influenced by the following particular fact, to wit (p. 408):

"(That the shares) were sold to the public as the issue of a company succeeding to the business of a failing concern, in an effort to raise new capital for the business. It seems most likely that new investors

> in a business whose future was certainly speculative could not be induced to risk their money in the new company except upon the assurance that if operations should result in net earnings they, the investors, would definitely receive a share of those earnings. * * *"

No claim is made that the Class B Debentures in the case at bar were paid for in cash at the time they were issued in connection with the reorganization in 1896. As we previously stated, they are a form of non-voting common stock, junior in lien to the Class A Debentures (analagous to First Preferred Stock) and to the Common stock (analagous to Voting Second Preferred Stock). The said opinion also states (p. 402):

> "The cases in this Commonwealth as well as those of other jurisdictions reveal, in general, a reluctance on the part of the courts to construe provisions relative to the declaration of dividends in such a way as to hold that it is mandatory upon the directors in any circumstances to declare dividends."

The *Crocker* case does not appear to have been followed in other jurisdictions.

Burk v. *Ottawa Gas & Electric Co., supra,* is readily distinguishable. The by-law construed provided that, "The preferred stock shall carry a six per cent per annum preferred, non-cumulative dividend * * * out of the net profits." No mention is made of any action to be taken by the directors, as in the case at bar. Furthermore, in discussing the *Burk* case, the Court, in *Crocker* v. *Waltham Watch Co., supra,* said (p. 406):

> "The Court (in the *Burk* case) was aided in reaching that construction (that dividends were manda-

tory) by another by-law which showed that, when dividends were meant to rest in the discretion of the directors, the draftsman knew how to employ appropriate language. That by-law read thus: 'Upon the common stock only such dividends and at such times shall be paid out of the company's net profits as the board of directors may in their judgment deem it advisable to declare.' "

Wood v. Lary, 47 Hun 550 (1888) is also similarly distinguishable.

There are many causes of action against foreign corporations wherein jurisdiction is taken by the courts where the suits are brought. It is settled law, however, that where an action affects the internal management of a foreign corporation, such as seeking to compel the declaration of dividends, courts in jurisdictions other than those in the state of the domicile of the corporation, will not take jurisdiction. The fact that the subject corporation may carry on activities in the State where the action is brought does not affect the rule. The leading cases supporting these principles are:

Rogers v. *Guaranty Trust Company*, 288 U. S. 123;

Cohn v. *Mishkoff Costello Co.*, 256 N. Y. 102;

Goldstein v. *Lightner*, 266 App. Div. 357, aff'd. 292 N. Y. 670;

Strassburger v. *Singer Manufacturing Co.*, 263 App. Div. 518;

Miesse v. *Seiberling Rubber Co.*, 264 App. Div. 373;

Nothiger v. *Corroon & Reynolds Corporation*, 266 App. Div. 299, aff'd. 293 N. Y. 682.

In *Rogers* v. *Guaranty Trust Co., supra,* the plaintiff did not seek to compel the payment of distributions from surplus earnings, analogous to dividends, as in the case at bar. Even the dissenting justices in that case were of the opinion that a suit of that nature would involve the internal affairs of the corporation, for Mr. Justice Stone, in his dissenting opinion, concurred in by Mr. Justice Brandeis, said (p. 144):

> "But the case before us is, in this respect, unlike a suit to * * * compel the declaration of a dividend, *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102."

On page 13 of Petitioners' brief, there is a statement to the effect that Justices Stone, Brandeis and Cardozo had dissented in the *Rogers* case and were of opinion that on the facts presented, jurisdiction should have been assumed. In Mr. Justice Stone's dissenting opinion, he stated on page 145, "We are presented with no problem of administration". In this opinion Mr. Justice Brandeis concurred. From an examination of Mr. Justice Cardozo's dissenting opinion, it would appear, although it is not definitely stated, that he felt that there was no problem of internal administration and he went on to say on page 151:

> "The doctrine of *forum non conveniens* is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused. At least that must be so when the wrong is clearly proved."

There is no charge of personal wrongdoing on the part of the Directors in this case as there was in the *Rogers* case.

In the leading case of *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102 (1931), the plaintiff demanded judgment that the defendant, a foreign corporation, either redeem shares of its stock at par value or, in the alternative, declare a dividend out of its surplus. The Court, after stating the principle that jurisdiction will not be taken to regulate the internal affairs of a foreign corporation, said (p. 105):

> "While it is not always easy to say when jurisdiction will be taken and when declined, and while contracts between a foreign corporation and its members will usually be enforced in the courts of this State, it seems clear that the jurisdiction now invoked must be declined under the principle stated."

The basis for the rule of noninterference with the internal affairs of a foreign corporation is set forth in *Overfield* v. *Pennroad Corporation*, 113 Fed. (2d) 6 (C. C. A. 3rd, 1940), wherein the Court said (p. 12):

> "The reason the state court of equity declines to take jurisdiction of a suit involving the internal affairs of a foreign corporation is because the matter will require the exercise of visitorial power."

The Petitioners contend that the fact that they reside in New York City and that some of the Respondent's activities are there makes the Southern District of New York a more convenient place for trial. The opinion in *Rogers* v. *Guaranty Trust Company* in the lower court, reported in 60 Fed. (2d) 114, reveals that the foreign corporation therein involved had its principal office in New York City, where its chief executives were located and where its Board of Directors held its meetings and kept its corporate records and yet jurisdiction in New York was declined.

In *Strassburger* v. *Singer Manufacturing Company, supra,* relied upon in the later case of *Goldstein* v. *Lightner, supra,* affirmed in 292 N. Y. 670, the complaint, included in the case on appeal therein, disclosed that the corporation involved was incorporated in a foreign state, New Jersey, that it had its main offices in New York, that it kept its books and records in New York, that it was managed by its officers and directors in New York and held its stockholders' and directors' meetings there and yet the New York Courts declined jurisdiction.

Judge Caffey, in the Court below, stated, as an additional reason why this case should be tried in Wisconsin, as follows:

> "Moreover, all the physical properties of the defendant (Respondent) which are operated and from which it derives earnings are located in Wisconsin, the State of its incorporation. It is there its main office and principal place of business are situated. There also its chief records are kept." (R. 50)

The principal and general offices of Respondent are situated in Green Bay, Wisconsin, where its President and all of its operating officers reside and have their offices. These officers are the President, the Purchasing Agent, the Assistant-Treasurer, the General Auditor and the Chief Engineer (R. 12). They would be the witnesses who would be called by Respondent to testify in a trial on the merits in this action and in their charge would be the records required to be produced at the trial.

Whether or not the Respondent's directors are amenable to process in Wisconsin is in no wise relevant. They are not made parties to the action.

The Class B Debentures were executed in the State of Wisconsin and specifically so state (R. 8). The fact that a New York Trust Company acted as Trustee to authenticate the Debentures and that, according to requirements of the New York Stock Exchange, transfer agencies for the Debentures and other securities of Respondent are kept within the State of New York, is without importance in the decision of the issues here involved.

Additional reasons which appealed to Judge Caffey in connection with his decision to decline jurisdiction were those stated in his opinion, and emphasized on page 11 of the Petitioners' brief, (1) that the defendant (Respondent) should not be put to the burden and expense of carrying on the litigation so far away as New York from its home state of Wisconsin, and (2) that when avoidable the full calendars of the District Court should not be crowded by a complicated cause of action which could better be tried in the forum of the domicile of the defendant (Respondent) corporation.

However, these are merely reasons additional to the basic reason that the cause of action involved the internal management of a foreign corporation. The charge that Judge Caffey abused his discretion in declining jurisdiction in this case remains totally unsubstantiated.

The principle above stated is not in conflict with Section 224 of the General Corporation Law of New York cited by the Petitioners. That section allows an action against a foreign corporation to be brought by a resident of New York. Without question, the New York Courts are vested with jurisdiction. However, they decline to take jurisdiction in "internal affairs cases" against foreign corporations. *Prouty* v. *Michigan S. & N. Indiana R. R. Co.*, 1

Hun 655 likewise does not conflict. The Court in that case held that it had jurisdiction, supporting the principle laid down in Section 224 aforesaid; the question of declining jurisdiction was neither raised in the said action nor in *Thomas* v. *Greenwood Lake Railway Co.*, 139 N. Y. 163. *Boardman* v. *Lake Shore & Michigan So. Railway Co.*, 84 N. Y. 157, another case cited by the Petitioners, is not relevant; the question of declining jurisdiction was not raised therein, nor was it proper to do so, for the defendant was a domestic corporation.

POINT II.

A trial on the merits of this suit will involve a construction of the contract between the Respondent and its security holders which will affect the interests of the public principally in Wisconsin and Courts of that State are the proper Courts to determine such construction.

This Court, in *New York, etc. Railroad* v. *Nickals*, 119 U. S. 296, seems to have held that contracts with a railroad may be affected by the public interest, stating (p. 306):

> "* * * the duty of the Company (is) to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight * * *."

Williston on Contracts is authority for the statement that "* * * contracts * * * affecting the public interest are to be construed liberally in favor of the public" (section 626).

The same principle seems to have been applied in construing the bond contract in *Thomas* v. *New York & Greenwood Lake Railway Company, supra*, wherein the Court at page 183, said:

> "The application of earnings to rebuilding the road might in many cases constitute necessary repairs. * * * the general improvement of the road to insure its safety (to the public), and to accommodate a growing business, may constitute necessary repairs, and the board of directors, acting in good faith, might so determine, and the contract does not withdraw these matters from the determination of the governing body of the corporation."

Even the Petitioners "expressly recognize * * * the right of the directors to exercise discretion in that respect (to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight) and to charge expenditures of this character against annual earnings * * *" (Br. 15, 16). But the Petitioners fail to put into practice that which they preach. They refuse to permit the directors to exercise that discretion. The Petitioners substitute themselves for the directors, apparently conducting their own private meeting, and arbitrarily allowing a deduction "for reserves * * * additions, general improvements and depreciation", (Br. 4) without consulting the directors.

The Respondent's directors may have decided to retain the surplus earnings as a reserve for the proper development of the railroad. They may have reasoned that the railroad, built at least a half century ago, should be rebuilt to compete with new roads and facilities, and not remain stationary by merely making necessary maintenance re-

pairs. As demonstrated, the Debentures clothe the directors and not the Petitioners with this discretion.

This Court in the case of *New York etc. Railroad* v. *Nickals, supra,* said (p. 306):

> "A different view (depriving the directors of discretion) would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were contemplated by the parties. For, if preferred stockholders become entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. * * * We are of opinion that (the) * * * preferred stockholders * * * are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole. * * *"

Continuing at page 310, this Court said:

> "'The mere fact,' the court said (in *Richardson* v. *Vermont & Massachusetts Railroad,* 44 Vt. 613, 622) 'of the corporation having funds in its treasury sufficient in amount to pay the orators, would not be sufficient to show the *ability of the corporation* contemplated in the vote and certificates. That ability must consist of a fund adequate not only for the payment of the claims of the plaintiffs in the

cause, but for the payment of all other stockholders having like claims; and must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad. In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders.'"

POINT III.

The Respondent by a decision of this Court in the instant case should not be precluded from a trial on the merits.

If this Court should not uphold Respondent's contention that the lower court properly exercised its discretion in declining jurisdiction, we then urge that the Court, in its opinion, state that it has not decided whether the Respondent's Board of Directors had discretion to declare a distribution of earnings or dividends on the Debentures and that the parties may at the trial have the opportunity to submit their proof on that issue. The only question arising on this appeal is whether the lower court upon the allegations in the complaint abused its discretion in declining to take jurisdiction of this action. The parties have not submitted proof required for a trial and decision upon the merits of the issue of the legal construction of the Class B Debentures to determine whether or not the Board of Directors is invested with discretion to declare dividends.

The authorities, hereinafter cited, hold that on a construction of a contract, the court may consider all of "the surrounding circumstances * * * when the contract was made." If such reservation is not made by this Court in its opinion, the Respondent will be deprived of a trial of the important issue in this case, without being afforded the opportunity of supplementing the language of the Debentures with proof of the circumstances surrounding the making of the contract, in accordance with the decisions in *Merrigm* v. *United States,* 107 U. S, 437 (1882) and in *Continental Insurance Co.* v. *Minneapolis St. P. & S. S. M. Ry. Co.,* 290 Fed. 87 (8 Circ. 1923 cert. denied 263 U. S.)

In *Merriam* v. *United States, supra,* the Court said at page 441:

> "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. *Nash* v. *Towne,* 5 Wall. 689; *Barreda* v. *Silsbee,* 21 How. 146, 161; * * *."

In *Continental Insurance Co.* v. *Minneapolis St. P. & S. S. M. Ry. Co., supra,* the Court said (p. 91):

> "* * * those terms (in the certificate) are not the only evidence of the contract, and that they must be read in connection with the charter and by-laws in force at the time the stock was issued, to ascertain the true terms of the contract, * * *."

CONCLUSION.

The order and judgment appealed from should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 100.—October Term, 1945.

Bertram Williams, Max Brasch and Heinz Mottek, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Petitioners, *vs.* Green Bay and Western Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners, residents of the City of New York, are holders of Class B debentures issued by respondent railroad company, a Wisconsin corporation. They brought this suit in the New York courts to recover amounts alleged to be due and payable under the debentures out of earnings in lieu of interest. On petition of respondent the action was removed to the federal District Court for the Southern District of New York on the grounds of diversity. Respondent thereupon moved (1) to set aside the service because respondent was not doing business in New York and (2) to dismiss because the subject matter was concerned with the internal affairs of a foreign corporation. The District Court denied the first motion, but granted the second. 59 F. Supp. 98. On appeal the Circuit Court of Appeals affirmed by a divided vote, holding that the District Court did not abuse its discretion in basing its dismissal on *forum non conveniens*. 147 F. 2d 777. We granted certiorari because of the importance of the question presented.

The Class B debentures, issued in 1896, have no maturity date. Their principal is payable "only in the event of a sale or reorganization" of the company and "then only out of any net proceeds" remaining after specified payments to the Class A debentures and to the stock. The covenant in the Class B debentures out of which

this litigation arises is set forth below.[1] The Circuit Court of Appeals was divided as to its meaning. The majority concluded that even though there were net earnings after the payments to the Class A debentures and to the stock, the directors had discretion to determine whether or not that sum should be paid to the Class B debentures. The court thereupon held, in reliance on *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102; *Cohen* v. *American Glass Window Co.*, 126 F. 2d 111, that the suit concerned the internal affairs of respondent and could better be tried in Wisconsin, the state of its incorporation. The minority thought that the amount of net earnings remaining after deducting the payments made to the Class A debentures and to the stock was to be paid to the Class B debentures, that the directors had no discretion to withhold such amounts, and that their payment involved nothing more than a ministerial act.[2] In that view the suit was substantially the same as one for a liquidated sum and would entail no interference with the internal affairs of a foreign corporation.

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[1] "The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of interest thereon participate in the distribution of annual net income to the following extent, viz.:—So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz.:—To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year; . . . ."

[2] Petitioners alleged that, with the exception of three years, respondent had substantial net earnings in each year from 1924 to 1943, inclusive, in excess of the amounts required to be paid and actually paid on the Class A debentures and on the stock. The aggregate amount of such net earnings, after deducting reserves for additions and general improvements and depreciation, and after deducting the payments on the Class A debentures and the stock was alleged to be approximately $1,650,000. The amounts actually paid on the Class B debentures during those years was $840,000, leaving due, according to petitioners, about $810,000.

We leave open the question of the proper construction of the "net earnings" covenant in the Class B debentures. Although we assume that the majority of the court below was right in its interpretation of the covenant, we think it was improper to dismiss the case on the grounds of *forum non conveniens*.

Rogers v. *Guaranty Trust Co., supra*, is the only decision of this Court holding that a federal court should decline to hear a case because it concerns the internal affairs of a corporation foreign to the State where the federal court sits. A corporation chartered by one State commonly does business in the farthest reaches of the nation. Its business engagements—the issuance of securities, mortgaging of assets, contractual undertakings—frequently raise questions concerning the construction of its charter, by-laws and the like, or the scope of authority of its officers or directors, or the responsibility of one group in the corporate family to another group. All such questions involve in a sense the internal affairs of a corporation—whether in a suit on a contract the corporation interposes the defense of *ultra vires*, or a bondholder sues on his bond or a stockholder asserts rights under his stock certificate. But a federal court which undertakes to decide such a question does not trespass on a forbidden domain. See *Williamson* v. *Missouri-Kansas Pipe Line Co.*, 56 F. 2d 503, 510. Under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, a federal court in a diversity case applies local law. In conflict of laws cases that may mean ascertaining and applying the law of a State other than that in which the federal court is located. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487. The fact that the corporation law of another State is involved does not set the case apart for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it. As we said in *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, "The diversity judisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts." So long as diversity jurisdiction remains, the parties may not be remitted to a state court merely because of the difficulty of making a decision in the federal court. *Meredith* v. *Winter Haven, supra*. If the District Court were sustained

in declining to exercise its jurisdiction in this case, there could be no assurance that the litigation would be transferred to the Wisconsin state courts. If petitioner sued in the federal court in Wisconsin, as they could by reason of diversity of citizenship, no reason is apparent why that court should not proceed to decision. The fact that the federal court in Wisconsin could pass on this internal affair of this corporation does not, of course, mean that the federal court in New York need do so. The nature of the problem presented and the relief sought might be of controlling significance in inducing the federal court in New York to remit the parties to Wisconsin. But as we shall see, no special circumstances of that nature are present here.

We mention this phase of the matter to put the rule of *forum non conveniens* in proper perspective. It was designed as an "instrument of justice".[3] Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive.[4] An adventitious circumstance might land a case in one court when in fairness it should be tried in

[3] Mr. Justice Cardozo dissenting, Rogers *v.* Guaranty Trust Co., *supra*, p. 151.

[4] In Gibb, International Law of Jurisdiction (1926), pp. 212-213, the law of England and Scotland is stated as follows: "the court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience, then, must amount to actual hardship, and this must be regarded as a condition *sine qua non* of success in putting forward a defence of *forum non conveniens*. For the general rule is that a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent."

In Societe du Gaz de Paris *v.* "Les Armateurs Francais", 1926 S. C. (H. L.) 13, perhaps the leading English case on the subject, a French manufacturing company sued a firm of French shipowners in a Scottish court on a charter-party. It provided that the vessel was to load a cargo of coal in England and proceed to a French port. The vessel, after loading, sailed and foundered. The plaintiff attached another vessel of defendants' found in a Scottish port and claimed damages by reason of the unseaworthiness of the vessel. Neither plaintiff nor defendant had a place of business in Scotland. The bulk of the evidence necessary to determine the controversy was French, no machinery existed for compelling the attendance of French witnesses in a Scottish court, no question of Scots law was involved, and a trial in Scotland would deprive defendants of a defense open under French law. A judgment sustaining the plea of *forum non conveniens* was sustained. Lord Chancellor Cave summarized the rule as follows: " . . . if in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was instituted, and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea by declining jurisdiction and permitting the issues to be fought out in the more appropriate Court." pp. 16-17. Lord Shaw of Dunfermline

another. The relief sought against a foreign corporation may be so extensive or call for such detailed and continuing supervision that the matter could be more efficiently handled nearer home.[5] The limited territorial jurisdiction of the federal court[6] might indeed make it difficult for it to make its decree effective.[7] But where in this type of litigation only a money judgment is sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it.[8] The

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stated: "If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a *forum* which is not the natural or proper *forum*, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the *locus contractus*, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied." p. 20.

And see Canada Malting Co. *v.* Paterson Steamships, 285 U. S. 413, 423, where Mr. Justice Brandeis speaking for the Court said, "Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." For reviews of the cases see Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1; Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41; Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867.

[5] See Wallace *v.* Motor Products Corp., 25 F. 2d 655, where a suit was brought in the federal court in Michigan to annul the reorganization of a New York corporation and to restore the stockholders of the old corporation to the position they had occupied prior to the reincorporation; Eberhard *v.* Northwestern Mut. Life Ins. Co., 210 Fed. 520, where policy holders of a Wisconsin life insurance company sued in the federal court in Ohio for an accounting of dividends received and paid and for an injunction against the election of trustees, and praying that the trustees who had committed allegedly wrongful acts be decreed not to be officers of the company and that a receiver of the company be appointed; Boyer *v.* Travelers' Protective Ass'n, 75 F. 2d 440, where suit was brought in the federal court in Pennsylvania to enjoin a Missouri corporation from enforcing certain amendments to its constitution; Cohen *v.* American Window Glass Co., 126 F. 2d 111, where stockholders of a Pennsylvania corporation sued in the federal court in New York to enjoin a proposed merger, to have declared illegal the payment of dividends, and to have a receiver, resident in Pennsylvania, appointed.

[6] Georgia *v.* Pennsylvania R. Co., 324 U. S. 439, 467-468, and cases cited.

[7] The same is true, of course, of state courts. See Taylor *v.* Mutual Reserve F. L. Ass'n, 97 Va. 60; Howell *v.* Chicago & N. Ry. Co., 51 Barb. 378, 383. Cf. also the cases where the court in which suit is brought cannot give the relief necessary to produce an equitable result (Marshall *v.* Sherman, 148 N. Y. 9; State *v.* Denton, 229 Mo. 187) or where the right of recovery is incapable of enforcement because it is so dissimilar to any which the court, whose jurisdiction is invoked, recognizes. Slater *v.* Mexican National R. R. Co., 194 U. S. 120.

[8] American Seating Co. *v.* Bullard, 290 Fed. 896, 901, where stockholders of a New Jersey corporation, who did not consent to the sale of its assets pursuant to a plan of reorganization and refinancing, sued in the federal court in Michigan to recover the value of their stock; United Milk Products

same may be true even where an injunction is sought.[9] We give these merely as illustrations. Each case turns on its facts. There are no special circumstances here, however, which should lead the District Court in New York to decline to exercise the jurisdiction which it has.

If petitioners' theory of the case is right, the court need go no further than it would in enforcing any contract to pay money. If, as the majority of the court below thought, the payment of net income to the Class B debentures rested in the discretion of the directors, the question under the applicable local law would normally be whether their discretion had been abused.[10] In case it were found to have been abused, the customary remedy is comparable to that which a court of equity affords in a suit for specific performance.[11] The point is that, however this suit be viewed, the relief sought is not of such a character as to suggest that the federal court in New York would be so handicapped that it should remit the parties to Wisconsin. There is a suggestion that the parties should be remitted to Wisconsin because a construction of the covenant will primarily affect the interests of the public in that State where all of respondent's railroad lines are located. Reference is made to *New York, Lake Erie & W. R. R. Co.* v. *Nickals*, 119 U. S. 296, where preferred stockholders sued for dividends which they claimed had been earned on their stock and wrongfully

Corp. *v.* Lovell, 75 F. 2d 923 (semble); National Lock Co. *v.* Hogland, 101 F. 2d 576 (semble); Overfield *v.* Pennroad Corp., 113 F. 2d 6, where stockholders brought a derivative action in the federal court in Pennsylvania to recover for wrongs done their company, a Delaware corporation, by a Pennsylvania company; Williamson *v.* Missouri-Kansas Pipe Line Co., *supra*, (semble). Cf. Kelley *v.* American Sugar Refining Co., 139 F. 2d 76.

[9] Harr *v.* Pioneer Mechanical Corp., 65 F. 2d 332, where stockholders of a Delaware corporation sued in the federal court in New York to enjoin the sale of stock on the representation that it had priority over the shares held by plaintiffs; American Creosote Works *v.* Powell, 298 Fed. 417, where stockholders of a Maryland corporation sued in the federal court in Louisiana to annul and cancel the issuance of certain stock.

[10] That is the usual rule in suits to compel the declaration of dividends. Dodge *v.* Ford Motor Co., 204 Mich. 459; Morey *v.* Fish Bros. Wagon Co., 108 Wis. 520, 529; Hiscock *v.* Lacy, 9 Misc. 578; Kassel *v.* Empire Tinware Co., 178 App. Div. 176.

See Spellman, Corporate Directors (1931) § 141; Weiner, Theory of Anglo-American Dividend Law, 29 Col. L. Rev. 461; Ballantine & Hills, Corporate Capital and Restrictions Upon Dividends Under Modern Corporation Laws, 23 Calif. L. Rev. 229.

[11] For the decree entered in Dodge *v.* Ford Motor Co., *supra* note 9, see Kales *v.* Woodworth, 20 F. 2d 395, 396. And see Boardman *v.* Lake Shore & M. S. Ry. Co., 84 N. Y. 157, 180; Kassel *v.* Empire Tinware Co., *supra* note 10, p. 180.

withheld. The Court construed the particular contract as vesting discretion in the directors. In holding that their discretion in withholding a distribution of net earnings had not been abused, it emphasized "the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight." p. 396. But such considerations will frequently be involved in applying the rule of *Erie R. Co.* v. *Tompkins, supra.* They go no further than to suggest one additional phase of local law which the federal court, whether it sits in New York or in Wisconsin, may have to apply. They fall far short of those instances, reviewed in *Meredith* v. *Winter Haven, supra,* p. 235, where the federal court declines to act because its action might interfere with state proceedings, or state functions, or the functioning of state administrative agencies.

It was held in *Weiss* v. *Routh,* 149 F. 2d 193, that a federal court in a diversity case was required by *Erie R. Co.* v. *Tompkins, supra,* to apply the local rule of *forum non conveniens.* We reserve decision on that question. For even if we assume the New York rule to be applicable here, we would reach no different result. *Cohn* v. *Mishkoff Costello Co., supra,* on which the court below relied was a suit against a foreign corporation for the redemption of its shares of stock or in the alternative for a declaration of a dividend. But that involved a degree of visitation not present here where petitioners seek only a money judgment on their debentures. Nor do petitioners challenge an act of the corporation which "offended solely against the majesty of the State to which it owed its life." *Ernst* v. *Rutherford & B. S. Gas Co.,* 38 App. Div. 388, 392. The Court of Appeals in the *Cohn* case stated that "contracts between a foreign corporation and its members will usually be enforced in the courts of this State." 256 N. Y. p. 105. Cardozo, J., stated the New York rule in *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259, 264, as follows: "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience or of efficiency or of justice point to the courts of the domicile of

the corporation as the appropriate tribunals." And see the New York authorities reviewed in *Weiss* v. *Routh, supra.* In the *Travis* case the court entertained a suit by a stockholder of a foreign corporation to compel the transfer of shares or to recover their value. We perceive in the present case no greater interference in the internal affairs of this foreign corporation.

Nor can we conclude that the maintenance of this suit in New York will be vexatious or oppressive. Petitioners, as we have said, reside there. While respondent's railroad lines are wholly in Wisconsin, it does business in New York. The Class B debentures are listed and traded in on the New York Stock Exchange. The amounts payable on them in lieu of interest are payable in New York. Respondent maintains its financial as well as a traffic office in New York. It maintains a bank account in New York, not only to take care of obligations under its securities, but also to handle excess operating funds not needed in Wisconsin. Five of respondent's six directors are to be found in New York. These five directors include all the executive and fiscal officers, except the president who supervises operations in Wisconsin and the general auditor who is in Wisconsin. Directors' meetings are customarily held in New York. Two of the three members of the executive committee, which acts for the board between meetings, are to be found in New York. Financial records, transfer books, minute books and the like are kept in New York. These facts plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered. We accordingly conclude that, the requirements of jurisdiction and venue being satisfied (Judicial Code, §§ 24, 51, 28 U. S. C. §§ 41(1), 112), the District Court should not have declined to hear and decide the case.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.